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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 69

PAUL H. BREITHAUPT,

Petitioner,

vs.

MORRIS ABRAM,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR THE PETITIONER

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INDEX

Subject Index

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions, statutes and rules involved	2
Questions presented	2
Statement	2
Argument:	
I. The Fourteenth Amendment bars admission of evidence of results of a blood test made to determine alcoholic content in prosecution for involuntary manslaughter where the blood sample tested was taken from accused while unconscious	4
A. A conviction obtained by the use of evidence secured from an assault upon the person is obtained in violation of the Due Process Clause of the Fourteenth Amendment	4
B. The evidence in question was obtained by violation in principle of the Fourth and Fifth Amendments, and the circumstances of the case bring this violation within the dynamic of the Due Process Clause of the Fourteenth Amendment	11
II. The release of petitioner on parole during the pendency of the petition for Writ of Certiorari herein did not render this cause moot especially where petitioner was returned as a parole violator after the writ was granted and before briefs were filed or argument made	13
Conclusion	20
Appendix A	21
Appendix B	22

CITATIONS

Constitutional Provisions:

	Page
Fourth Amendment	11
Fifth Amendment	11
Fourteenth Amendment	11

CASES

Abie State Bank v. *Bryan*, 282 U.S. 765	13
Adamson v. *California*, 332 U. S. 46	11
Apadoca v. *State*, 140 Tex. Cr. 593, 146 S.W.2d 381	9
Bonahan v. *Nebraska*, 125 U. S. 692	16
Boyd v. *United States*, 116 U. S. 616	8
Breithaupt v. *Abram*, 58 N. M. 385, 271 P.2d 827	1
Eisler v. *United States*, 338 U. S. 189	16
Ex Parte Endo, 323 U. S. 283	15
Ex Parte Tom Tong, 108 U. S. 556	13
Ex Parte Vigil, 24 N. M. 640, 175 P. 713	17
Olmstead v. *United States*, 277 U.S. 438	11
People v. *Cahan*, 44 Cal.2d 434, 282 P.2d 905	9
People v. *Haesseler*, 41 Cal.2d 252, 260 P.2d 8	8
People v. *LeDoux*, 155 Cal. 535, 102 P. 517	9
People v. *Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383	9
Price v. *Johnson*, 334 U. S. 266	14
Rochin v. *California*, 342 U. S. 165	4, 7, 11
Sellers v. *Bridges*, 153 Fla. 586, 15 So. 2d 293	19
Smith v. *United States*, 94 U.S. 97	16
State v. *Barela*, 23 N. M. 394, 168 P. 545, L.R.A. 1918B 844	8
State v. *Berg*, 76 Ariz. 96, 259 P.2d 261	10
State v. *Dillon*, 34 N. M. 366, 281 P. 474	6, 8
State v. *Height*, 117 Iowa 650, 91 N. W. 935, 59 L.R.A. 437	9
State v. *Sisneros*, 42 N. M. 500, 82 P.2d 274	12
State v. *Weltha*, 228 Iowa 519, 292 N.W. 148	9
St. Pierre v. *United States*, 319 U. S. 38	14
Sunal v. *Large*, 332 U. S. 174	14
Trailmobile Co. v. *Whirls*, 331 U. S. 40	13

Page

Turvey v. *State*, 95 Okla. Cr. 418, 247 P.2d 304 10
United States v. *Smith*, 331 U. S. 469 14
United States ex rel. Innes v. *Crystal*, 319 U. S. 755 15
Weber v. *Squier, Warden*, 315 U.S. 810, No. 912 16
Weeks v. *United States*, 232 U. S. 383 8
Wolf v. *Colorado*, 338 U. S. 25 8, 11

State Constitutional Provisions and Statutes:

Art. II, § 10, New Mexico Constitution 8
Art. II, § 15, New Mexico Constitution 8
Art. II, § 18, New Mexico Constitution 8
§ 40-24-27, N. M. Stat. Anno. 1953 Comp. 12
§ 41-17-13, N. M. Stat. Anno. 1953 Comp. 18
§ 41-17-34, N. M. Stat. Anno. 1953 Comp. 18
§ 41-17-24, N. M. Stat. Anno. 1953 Comp. 18
§ 41-17-28, N. M. Stat. Anno. 1953 Comp. 18
§ 41-17-32, N. M. Stat. Anno. 1953 Comp. 19
§ 42-1706, N. M. Stat. Anno. 1941 Comp. 17
§ 42-1707, N. M. Stat. Anno. 1941 Comp. 17
§ 42-1709, N. M. Stat. Anno. 1941 Comp. 17
§ 42-1710, N. M. Stat. Anno. 1941 Comp. 17

Annotations and Texts:

25 A.L.R. 2d 1407 10
164 A.L.R. 967 10
159 A.L.R. 201 10
148 A.L.R. 1243 20
127 A.L.R. 201 10
32 C.J.S., Evidence, § 601 6
28 R.C.L., Witnesses § 20, p. 434 7

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of New Mexico (R. 5) is reported at 58 N. M. 385, 271 P. 2d 827.

Jurisdiction

The opinion of the Supreme Court of New Mexico became final on July 6, 1954 (Appendix B to Petition for Writ of Certiorari). The Petition for Writ of Certiorari was docketed on October 1, 1954. The jurisdiction of this Court rests on 28 U.S.C. 1257 (3).

Constitutional Provisions, Statutes and Rules Involved

Fourteenth Amendment (in pertinent part):

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Whether the taking of a blood sample from petitioner while he was unconscious following an automobile accident and the admission of the results of such test as evidence of intoxication at the trial of the petitioner for involuntary manslaughter was a denial of due process of law under the Fourteenth Amendment.

2. Whether the release of petitioner on parole during the pendency of the Petition for Writ of Certiorari herein rendered the cause moot especially where petitioner was returned as a parole violator after the writ was granted and before briefs were filed or argument made.

Statement

On April 5, 1951, Petitioner was tried in the Fifth Judicial District Court of the State of New Mexico, convicted of the charge of involuntary manslaughter and sentenced to imprisonment in the state penitentiary of not less than six years nor more than ten years. (R. 2)

The charge was filed following the collision of a pickup truck driven by petitioner with another motor vehicle. The

collision resulted in the death of three persons, all of whom were riding in the automobile with which petitioner's truck collided.

Petitioner was taken to a hospital following the accident and there, while petitioner was unconscious (R. 6, 13, 14) a blood sample of about 20 c.c. was withdrawn by the doctor on duty at the direction of a state policeman. (R. 6, 13, 14, 23) Over the objection of counsel for petitioner, testimony concerning the taking of the sample and the results of test for alcoholic content was permitted at the trial. (R. 6, 12-24)

No appeal was taken from the conviction (R. 6). After intervening proceedings (Petition for Writ of Certiorari, p. 3) petitioner filed Petition for Writ of Habeas Corpus in the Supreme Court of the State of New Mexico on July 30, 1953 (R. 1), which court ordered issuance of the writ (R. 4).

Following issuance of the writ (R. 4), and the return (R. 4) the matter was heard by the New Mexico Supreme Court and an opinion entered on July 15, 1954, denying the petition for the writ (R. 5) became final on July 6, 1954 (Appendix B, Petition for Writ of Certiorari).

Petition for Writ of Certiorari was filed October 1, 1954, and granted April 23, 1956.

Petitioner was released on parole from the New Mexico Penitentiary on December 15, 1954 and was returned to custody under a warrant issued by the Parole Board of the State of New Mexico, dated June 11, 1956, meeting, the Parole Board revoked petitioner's parole as of February 11, 1955, being date of the occurrence of the first violation of parole. Appendix A, this brief.

Because of these circumstances, this Court has requested argument on the question of mootness of this proceeding in the briefs.

Heretofore, and by letter dated December 2, 1955, prior to the issuance of the Writ of Certiorari herein, in response to inquiry from the Clerk of this Court, petitioner's counsel and one of the counsel for respondent, joined in a letter addressed to the Clerk of this Court, stating it was their joint view the application for Writ of Certiorari was not rendered moot by virtue of the release of petitioner from the state penitentiary on parole. A copy of this letter is attached hereto as Appendix B.

ARGUMENT

I

The Fourteenth Amendment Bars Admission of Evidence of Results of a Blood Test Made to Determine Alcoholic Content in Prosecution for Involuntary Manslaughter Where the Blood Sample Tested Was Taken from Accused While Unconscious.

A. *A conviction obtained by the use of evidence secured from an assault upon the person is obtained in violation of the Due Process Clause of the Fourteenth Amendment.*

Petitioner contends the facts of the instant case bring it squarely under the rule announced in *Rochin* v. *California*, 342 U. S. 165, 173, that "convictions cannot be brought about by methods that offend a 'sense of justice'."

The method denounced in the Rochin decision was the illegal breaking into the privacy of the petitioner, in the forcible extraction of his stomach's contents.

The method employed in the instant case is likewise an illegal breaking into the privacy of petitioner, in the forcible extraction of his blood.

Rochin resisted the force employed upon him, though unsuccessfully; whereas petitioner was incapable of offering

any resistance, he being unconscious at the time the force was exercised.

This Court defined its function in reviewing challenges under the Due Process Clause and the meaning of that clause, as follows:

> . . . Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," . . . or are "implicit in the concept of ordered liberty." (p. 169)

The Due Process Clause does not spend itself in shielding the people from unlawful assault upon the person to obtain evidence of the commission of crime, it also serves as mandate that the fruits of such assault shall not be employed in procuring conviction. At page 172, 173 of the Rochin decision, it is said:

> It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. . . . They are only instances of the

> general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." . . . It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.

This Court swept aside distinctions made between "real" and "verbal" evidence in performing its duty under the due process clause, saying to do otherwise would be to "ignore the reasons for excluding coerced confessions," which are obnoxious not only because of unreliability, but because they are achieved by means forbidden. If the distinction still has an vitality, it should not be applied in this case because the evidence objected to is *not* real evidence.[1]

Real evidence is defined:

> Demonstrative or real evidence is evidence addressed directly to the senses without the intervention of witnesses as by actual sight, hearing, or taste. (32 C.J.S. Evidence, §601)

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[1] Apparently the New Mexico Supreme Court recognized the evidence in question was not "real" evidence, but refused to classify it as verbal, and upheld its admission under the statement: Compulsory or involuntary testimony from a defendant may and should be excluded but the rule in this jurisdiction has not been extended to cover real evidence or the case at hand." Opinion below, 58 N. M. 385, 391, 271 P. 2d 827.

It may be noted *State* v. *Dillon*, 34 N. M. 366, 281 P. 474, involved an attempt to suppress real or demonstrative evidence, certain liquors, seized under illegal search warrant, upon prosecution for keeping intoxicating liquor for sale. This is a typical example of "real" evidence, an article which shows the commission of the crime charged and is sufficiently identified and connected with accused and the crime charged.

But any evidence, verbal or real, should be excluded, where the conduct of the officers takes by force from an accused that which he has a right to keep secret, thereby crossing the borderline between procuring evidence and coercing confession of guilt. In 28 R.C.L. (Witnesses) §20, p. 434, it is said:

> The rights intended to be protected by the constitutional provision that no man accused of crime shall be compelled to be a witness against himself are so sacred, and the pressure toward their relaxation so great when the suspicion of guilt is strong and the evidence obscure, that it is the duty of courts liberally to construe the prohibition in favor of personal rights, and to refuse to permit any steps tending toward their invasion. Hence, there is the well-established doctrine that the constitutional inhibition is directed not merely to the giving of oral testimony, but embraces as well the furnishing of evidence by other means than by word of mouth, the divulging, in short, of any fact which the accused has a right to hold secret.

As if with foreknowledge of this very case, Mr. Justice Douglas declared in his concurring opinion in *Rochin*, 342 U. S. 177, 179.

> . . . Of course an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat. See Holt v. United States, 218 U. S. 245, 252, 253. But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment.

Evidence obtained through violation of federal constitutional guaranties has been excluded in federal prosecutions since the decision in *Boyd* v. *United States*, 116 U. S. 616, and particularly since *Weeks* v. *United States*, 232 U. S. 383. This exclusionary rule has been rejected in numerous state cases, but has been followed in others, as is more particularly set out below. Reference is also made to *Wolf* v. *Colorado*, 338 U. S. 25, where the state cases are collected.

New Mexico rejected the doctrine of the *Weeks* case in the case of *State* v. *Dillon*, 34 N. M. 366, 281 P. 474, despite the fact the New Mexico Constitution contains provisions which are, for present purposes, identical with the Fourth, Fifth, and Fourteenth Amendments.[2] The New Mexico Supreme Court discussed and quoted the *Rochin* case, *supra*, and the two New Mexico decisions dealing with the matter of admission of evidence obtained in violation of the defendant's constitutional rights, *State* v. *Barela*, 23 N. M. 395, 168 P. 545, L.R.A. 1918B 844,[3] and *State* v. *Dillon*,[4] *supra*.

In its determination of the effect of the *Rochin* case the New Mexico Court quoted extensively from the California case, *People* v. *Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8, which

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[2] "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, . . ." (New Mexico Constitution, Art. II, § 10)

"No person shall be compelled to testify against himself in a criminal proceeding . . ." (New Mexico Constitution, Art. II, § 15)

"No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws." (New Mexico Constitution, Art. II, § 18)

[3] The court held in a prosecution for arson that evidence of the correspondence of the tracks of the accused made under compulsion of the sheriff with those found at the scene of alleged crime and leading therefrom and evidence of the fitting of the shoes of the accused taken from them by the sheriff into tracks found at scene of crime was not inadmissible as violative of the constitutional guaranty against compulsory self-inerimination.

[4] Discussed *supra*, footnote 1.

dealt with a factual situation very nearly identical with that here present, wherein the California court distinguished the situation from that in the *Rochin* case with which distinction the New Mexico court agreed.

Subsequent to the decision of the New Mexico court, the California Supreme Court in *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, ruled that evidence obtained in violation of the constitutional guaranties was inadmissible and specifically overruled its prior decisions in *People* v. *LeDoux*, 155 Cal. 535, 102 P. 517; *People* v. *Mayen*, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383, and the cases based thereon, stating:

> We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. (282 P. 2d at 911).

The Iowa Supreme Court in a situation identical with that in the now overruled *Haeussler* case, *supra*, and the present case, followed the exclusionary rule in *State* v. *Weltha*, 228 Iowa 519, 292 N.W. 148. See also *State* v. *Height*, 117 Iowa 650, 91 N.W. 935, 59 L.R.A. 437.

The Texas Court of Criminal Appeals in *Apodaca* v. *State*, 140 Tex. Cr. 593, 146 S.W. 2d 381, held that compelling the accused to submit to certain tests and to give a urine specimen required the exclusion of testimony as to such tests and the conclusion that the accused was intoxicated because of the violation of the state constitutional provision against self incrimination.

In a decision in which evidence of results of a drunkometer test was declared admissible, the Arizona Supreme

Court in *State* v. *Berg*, 76 Ariz. 96, 259 P. 2d 261, 266, declared:

> We can see no legal difference in the right to a specimen of defendant's breath to be used as evidence in cases of drunk driving *where the body of the person is neither invaded nor assaulted* and the right to search his person and premises and seizing such physical evidence as deemed necessary to procure a conviction of the crime for which he was arrested. We have read the case of Rochin v. People of the State of California (cited supra) cited by defendant and find no similarity whatever in that case to the case at bar . . . . The conviction in that case reversed on the ground that it violated the due process clause of the 14th Amendment to the Constitution of the United States. *Neither is there any similarity in the instant case to cases cited relating to the taking of blood tests of a defendant which is accomplished by withdrawing blood from the veins of the body through the medium of a needle constructed for that purpose* . . . (Emphasis supplied)

The Oklahoma Court of Criminal Appeals in *Turvey* v. *State*, 95 Okla. Cr. 418, 247 P. 2d 304, 307, cited the *Apodaca* case, *supra*, stating, "The Court should not admit evidence of defendant's intoxication where such tests were given over objection of the accused."

See Annotations in 25 A.L.R. 2d 1407, at 1412, and 164 A.L.R. 967, dealing with requiring submission to physical examination or tests as violation of constitutional rights. See also Annotations in 127 A.L.R. 1513 and 159 A.L.R. 201, on admissibility of evidence based on scientific tests for intoxication.

B. *The evidence in question was obtained by violation in prinaiple of the Fourth and Fifth Amendments, and the circumstances of the case bring this violation within the dynamic of the Due Process Clause of the Fourteenth Amendment.*

In previous decisions, some members of this Court have shown concern as to whether evidence obtained by State officers was in fact obtained in violation of the concepts housed in the Fourth and Fifth Amendments, protection against unreasonable search and seizure and the privilege against self-incrimination.[5]

While petitioner does not challenge the long array of decisions of this Court that the first ten amendments to the United States Constitution were not extended to the States under the Fourteenth Amendment, he does rely upon the "generative principles" set forth in the Bill of Rights to the extent that these principles need to be considered by this Court in determining whether petitioner's conviction offends against the Due Process Clause of the Fourteenth Amendment.

It is therefore submitted that petitioner's conviction was based upon evidence obtained by unreasonable search and seizure. The invasion of petitioner's person was made under no authority of law or precedent whatsoever, and it is difficult to imagine any search and seizure which could be more unreasonable. If the house and papers of an accused

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[5] *Rochin* v. *California*, 342 U. S. 165, concurring opinions of Mr. Justice Black, 174, and Mr. Justice Douglas, 177. *Wolf* v. *Colorado*, 338 U. S. 25, concurring opinion of Mr. Justice Black, 39; dissenting opinion of Mr. Justice Douglas, 40; Dissenting opinion of Mr. Justice Murphy, 41; dissenting opinion of Mr. Justice Rutledge, 47. *Adamson* v. *California*, 332 U. S. 46, dissenting opinions of Mr. Justice Black, 68, and Mr. Justice Murphy, 123. Compare, *Olmstead* v. *United States*, 277 U. S. 438, dissenting opinions of Mr. Justice Holmes, 469, and Mr. Justice Brandeis, 471.

are guarded against unauthorized and unreasonable search and seizure, then the intrusion into his person when he is unconscious must certainly have no sanction, or the rights of individuals under a state of civilization will be sadly, if not fatally, damaged.

It is further submitted that petitioner's conviction was based upon evidence secured from him against his will (he being unconscious) and used over his objection, and he was thereby compelled to testify against himself, upon prosecution for the crime of involuntary manslaughter under § 40-24-7, N.M.S.A., 1953 Compilation, which provides:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: 1st. Voluntary: Upon a sudden quarrel or in the heat of passion. 2nd. Involuntary: In the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection.

It was held in *State* v. *Sisneros*, 42 N.M. 500, 82 P. 2d 274, the act of an intoxicated person in driving an automobile recklessly may be such criminal negligence as would warrant a finding of manslaughter if such operation of the automobile was the proximate cause of death.

Regardless of the guilt or innocence of petitioner of the crime charged, it could not be demanded of him that he tell the jury he was intoxicated. How then may evidence of the results of a test upon his blood taken from him by invasion of the body while he was unconscious and to the use of which he objected fully thereafter be held anything other than compulsory self-incrimination? Petitioner submits the use of such evidence under the circumstances of this case was the very gist of self-incrimination—for all practical purposes, a confession of guilt unlawfully demanded and taken from an accused.

II

The Release of Petitioner on Parole During the Pendency of the Petition for Writ of Certiorari Herein Did Not Render This Cause Moot Especially Where Petitioner Was Returned as a Parole Violator After the Writ Was Granted and Before Briefs Were Filed or Argument Made.

The nature of the remedy of the writ of habeas corpus is set forth in *Ex Parte Tom Tong*, 108 U. S. 556, 559, 560:

> The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not in inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act . . . petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process . . .

It is submitted that in general a change of circumstances, whether by act of parties, or a change in statutory law, or by the mere lapse of time, will not render a case moot so long as there still remains a justiciable controversy and power of the tribunal to grant appropriate relief. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40; *Fiswick* v. *United States*, 329 U. S. 211; *Factor* v. *Laubenheimer*, 290 U. S. 276; and *Abie State Bank* v. *Bryan*, 282 U. S. 765.

Thus in *Fiswick* v. *United States, supra,* this Court reviewed petitioner's conviction for conspiring to file false registration statement under the Alien Registration Act and to conceal his membership in the Nazi party, against the suggestion that the cause had become moot by virtue of the fact petitioner had already served the sentence imposed upon him under such conviction, because of the considerations that a conviction might weaken his defense to a deportation proceeding, impair his chances of naturalization and subject him to the loss of certain civil rights. The Court said: ". . . Fiswick has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed upon him. In no practical sense, therefore, can Fiswick's case be said to be moot." (P. 222) [6]

Similarly it was held in *Factor* v. *Laubenheimer, supra,* that a proceeding in habeas corpus was not moot and did not abate where the extradition treaty under which arrest was had was supplanted by a new treaty under which the obligation to surrender petitioner to the foreign authority was continued without change in substance.

It is further submitted, as a general proposition, that whether or not a case is moot is a question to be determined by consideration of the facts existing at the time the inquiry is made. (See authorities cited *supra,* this point.)

The scope of relief sought by petitioner in the instant case is his release from confinement under a conviction obtained in violation of the due process clause. The controversy is a justiciable one. *United States* v. *Smith,* 331 U. S. 469; *Sunal* v. *Large,* 332 U. S. 174; *Price* v. *Johnson,* 334 U. S. 266; and *Hawk* v. *Olson,* 326 U. S. 271. Therefore the question remains, can this Court, by its direction to the Supreme

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[6] The case of *St. Pierre* v. *United States,* 319 U. S. 38, was distinguished on the ground petitioner there had not shown he would be subject to any further penalties on the ground of a judgment for contempt fully satisfied by service of term of imprisonment.

Court of the State of New Mexico, make effective any decision it might render as to such controversy. Petitioner submits his release from confinement can unquestionably be accomplished through service of the Writ of Habeas Corpus upon the respondent, if it be determined petitioner should prevail in his contention on the merits. On the other hand, if the case should be decided against him, petitioner will continue in the New Mexico Penitentiary serving the balance of his unexpired term on the conviction he challenges. The fact that he was released on parole for an interval after the filing of his Petition for Writ of Certiorari can hardly mitigate against the fact that he was convicted of the crime of involuntary manslaughter, sentenced to a term of imprisonment in the state penitentiary, and is now confined in that institution serving the balance of his unexpired term.

No case has been found where the question of mootness has been considered under identical circumstances. However, the case of *Ex Parte Endo*, 323 U. S. 283, does bear similarity to the instant case. There a loyal American citizen of Japanese ancestry was placed in a War Relocation Center. She was denied a Writ of Habeas Corpus by the United States District Court for the Northern District of California. Pending appeal from such denial, she was transferred to another relocation center in another judicial circuit. Question arose as to whether the case became moot. The Court noted the Acting Secretary of the Interior had advised if the writ were served on the Secretary or any official of the War Relocation Authority, one such official being in the judicial district where the case arose, the petitioner would be produced and the order complied with. After distinguishing *United States ex rel. Innes* v. *Crystal*, 319 U. S. 755, wherein writ of habeas corpus was sought for a member of the military who was later removed to a fed-

eral penitentiary in a different district and circuit, the Court held the case was not moot, saying:

> . . . the District Court acquired jurisdiction in this case and that the removal of (petitioner) did not cause it to lose jurisdiction where a person in whose custody she is remains within the district. . . . we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. (p. 306)

After noting the statutory jurisdiction of federal district courts to grant writs of habeas corpus for the purpose of inquiry into the cause of restraint of liberty, the Court ruled:

> . . . That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun.

Another line of authority to be noted does not deal with habeas corpus proceedings, but is illustrative of inquiry into the question of mootness. These cases involved the circumstance of a petitioner securing the grant of review of his conviction and then escaping from custody before decision upon review. In three instances this Court has followed the practice of ordering the case removed from the docket until further order, pending return of the fugitive. *Eisler* v. *United States*, 338 U. S. 189; *Bonahan* v. *Nebraska*, 125 U. S. 692; *Smith* v. *United States*, 94 U. S. 97.

Petitioner has not overlooked this Court's decision denying a petition for writ of certiorari in *Weber* v. *Squier, Warden*, 315 U. S. 810, No. 912, on the ground the cause was moot, "it appearing that petitioner has been released upon

order of the United States Board of Parole and that he is no longer in the respondent's custody."

Petitioner believes this ruling is not controlling in the present case for the reason that he is presently in the custody of respondent. Furthermore, as the denial of certiorari in *Weber* v. *Squier, Warden,* does not consider under what terms, if any, parole was made, or the situation with respect to constructive, as distinguished from actual custody, petitioner believes the question of mootness regarding the present application is still an open one.

It is submitted that the return of petitioner to actual custody of respondent makes a ruling on the effect of the granting of parole in this regard unnecessary. However, in order to make full exposition of petitioner's case, following paragraphs are descriptive of the effect of parole in New Mexico.

At the time of petitioner's conviction and commitment, the New Mexico statutes on parole were §§ 42-1706, 42-1707, 42-1709, and 42-1710, New Mexico Statutes Annotated, 1941 Compilation. The New Mexico Supreme Court interpreted § 42-1706,[7] in Ex Parte Vigil, 24 N.M. 640, 175 P. 713, as empowering the Superintendent to retake and reimprison any inmate on parole when in his judgment the terms of the

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[7] "The said prison board shall have power to establish rules and regulations under which prisoners within the penitentiary may be allowed to go upon parole outside the penitentiary building and enclosure (one of which shall be the total abstinence from alcoholic liquors as a beverage), after having served the minimum term of his sentence, but to remain while on parole in the legal custody and under the control of the prison board and subject at any time to be taken back within the enclosure of said penitentiary; and full power to enforce such rules and regulations and to retake and reimprison any inmate so upon parole is hereby conferred upon the superintendent, whose order, certified by the clerks of the prison, with the seal of the penitentiary attached thereto, shall be a sufficient warrant for all officers named therein to authorize such officers to return to actual custody any conditionally released or paroled prisoners. . . ."

parole agreement had been violated, and that such action by the Superintendent was not reviewable. The court stated:

> . . . Under the statute the paroled convict is at all times in the legal custody and under the control of the prison board, and subject at any time to be taken back within the inclosure of said penitentiary. Being thus at all times in the constructive custody of the prison board, the paroled convict is no more entitled to a hearing in the courts as to whether or not he has violated the terms of his parole agreement than he would be if he were a "trusty" employed temporarily outside the penitentiary on road work or in some other service for the state." (175 P. 713, 714)

Subsequent to petitioner's commitment to the penitentiary, the New Mexico Legislature enacted the Parole Act of 1955 (§§ 41-17-13 to 41-17-34, New Mexico Statutes Annotated, 1953 Compilation, 1955 Pocket Supplement), which Act became effective March 26, 1955, and repealed the prior sanctions on parole.

Section 41-17-24, *supra*, provides in pertinent part: " . . . every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board . . ."

Section 41-17-28, *supra*, provides in pertinent part: "At any time during release on parole the board may issue a warrant for the arrest of the released prisoner for violation of any of the conditions of the release, or a notice to appear to answer to a charge of violation. Such notice shall be served personally upon the prisoner. The warrant shall authorize the superintendent of the correctional institution from which the prisoner was released to return such prisoner to the actual custody of the institution or to

any other suitable detention facility designated by the board; if the prisoner is out-of-state, the warrant shall authorize the superintendent to return him to the state . . . ."

Section 41-17-32, *supra*, provides "The provisions of this act are hereby extended to all persons who, at the effective date thereof, may be on parole, or eligible to be placed on parole under existing laws, with the same force and effect as if this act had been in operation at the time such persons were placed on parole or became eligible to be placed thereon, as the case may be."

It is submitted that under the situation here present both the old and new parole acts of New Mexico provided that a parolee remained in legal custody and therefore the parole itself did not render this controversy moot.

It is petitioner's contention that at all times since his conviction and commitment he has been under legal custody, either actual or constructive. As noted at the beginning of this argument, the petition for a writ of habeas corpus is a civil action brought to regain liberty. It cannot realistically be argued that a prisoner on parole is at liberty. When considering this exact question, the Supreme Court of Florida held in *Sellers* v. *Bridges*, 153 Fla. 586, 15 So. 2d 293, 148 A.L.R. 1240, that petitioner is at large as a parolee upon terms and conditions imposed by the parole commission restricting his fundamental liberties and privileges does not deprive him of remedy by habeas corpus on the ground that the commitment for imprisonment was void. The Florida Court reasoned:

> Parole is that procedure by which a prisoner who must in any event be returned to society at some time in the future is allowed to serve the last portion of his sentence outside prison walls and under strict supervision, as preparation for his eventual return to society.

After noting Florida parole procedure, the court continued:

Parole, therefore, is not an act of amnesty or forgiveness —as some suppose. It does not put an end to sentence legally imposed. Rather, it is a continuation of sentence. (15 So. 2d 293, 295) See also annotation following report of this case in 148 A.L.R. at p. 1243.

Conclusion

The judgment of the Supreme Court of the State of New Mexico is in error and should be reversed and the case remanded with directions to issue its Writ of Habeas Corpus to respondent to release petitioner.

Respectfully submitted,

F. Gordon Shermack,
142 West Palace Avenue,
Santa Fe, New Mexico,
Counsel for Petitioner.

APPENDIX A

State of New Mexico

BOARD OF PAROLE

P. O. Box 1219
Santa Fe, N. M.
Telephone: 3-7592
Wm. J. Cooper,
Director of Parole,
Interstate Compact Administrator

October 2, 1956.

Mr. Gordon F. Shermack
Attorney at Law
Bokum Building
Santa Fe, New Mexico

Re: Breithaupt, Paul
NMSP # 13633

Dear Mr. Shermack:

In compliance with your telephonic request of this date, we are hereby advising you that the above named subject was paroled from the Penitentiary of New Mexico effective December 15, 1954, with a termination date of June 29, 1957. This is the information contained on his parole agreement signed by him on December 16, 1954. Other records in our files indicate that his maximum expiration date is July 9, 1957. This subject had been under parole supervision in California under the terms of the Interstate Compact for supervision of parolees and probationers and the records show that he had given the California Parole Authorities a great deal of trouble throughout. At the meeting of the

Parole Board on August 13, 1956, Mr. Breithaupt's parole was revoked effective February 1, 1955 with his new commitment time to begin as of July 17, 1956.

Yours very truly,

WM. J. COOPER,
Director of Parole.

WJC/acs.

APPENDIX B

December 2, 1955.

Harold B. Willey, Clerk
Supreme Court of the United States
Washington 13, D. C.

Re: Paul H. Breithaupt v. Abram, No. 6 Misc., Oct. Term, 1955, Formerly No. 234 Misc., Oct. Term, 1954

Dear Sir:

Your letters of November 17, 1955, concerning the above matter have been received and are being jointly answered by counsel for both parties.

The petitioner is still on parole, which situation is due to continue until his final discharge date sometime in 1957.

Both of us are of the feeling that the fact of petitioner's status as a parolee does not make the above cause moot. Chapter 232, Laws of 1955.

A similar statute has been construed by the Supreme Court of New Mexico in Ex parte Vigil, 24 N. M. 640, 175 P. 713, to vest absolute discretion in a superintendent of the penitentiary to retake and reimprison any convict on parole in the exercise of his sole discretion. As may be seen from the wording of the statute, the convict remains in the legal

custody and under the control of the prison board during the time he is on parole.

We are advised that at the present time there are no proceedings pending to bring about the reconfinement of petitioner and that proceedings which had formerly been instituted for that purpose have been dropped.

Counsel for petitioner has written petitioner to ascertain his desires with regard to further prosecution of his case. We will advise you promptly as soon as a reply has been received from petitioner.

We trust that the foregoing will be of some assistance to the Court in its disposition of the above matter.

Very truly yours,

F. GORDON SHERMACK,
One of the Attorneys for the Petitioner.
WALTER R. KEGEL,
Assistant Attorney General,
One of the Attorneys for Respondent.